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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT AYERS, JR., Warden,

Petitioner,

v.

TROY ISAIAH MITCHELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the rules in *United States v. Powell*, 469 U.S. 57 (1984), and *United States v. Watts*, 117 S. Ct. 633 (1997), which were developed in the context of general jury verdicts, be imposed on the fundamentally different special finding, effectively eradicating the very purpose of special findings?

2. Does *Teague v. Lane*, 489 U.S. 288 (1989), apply to a case that does not break new ground or impose new obligations on a bedrock element of criminal procedure?

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INTRODUCTION

Respondent Troy Isaiah Mitchell ("Mitchell") respectfully opposes the petition for writ of certiorari ("Petition") filed by Warden Robert Ayers, Jr. (hereinafter, the "State"). The Ninth Circuit Court of Appeals' decision to grant Mitchell's habeas corpus petition was based on well-established law and did not create a conflict among the circuits. In a desperate attempt to create an issue worthy of certiorari review where none exists, the State presents an argument that is predicated on the fundamental false premise that a special finding is the same as a general acquittal. Once this misconception is exposed, the State's Petition collapses.

STATEMENT OF THE CASE

On July 11, 1989, Jerry Knox was killed after being shot by gang members and run over by a getaway car. The murder occurred outside of Mitchell's apartment. On January 23, 1990, the Los Angeles County District Attorney charged Mitchell, and only Mitchell, with the first degree murder of Knox.

The case against Mitchell was based on allegations that Mitchell was the direct perpetrator of the murder; that is, that Mitchell used a gun and/or struck Knox with a car. As the prosecutor told the jury:

> In order for the people to prove this case you have to believe either that the defendant was at

> some point pointing a gun at Jerry Knox, and/or firing it, or drove over him in that car.[1]

At trial, the parties presented conflicting evidence of Mitchell's involvement in the gang shooting and the hit-and-run, as well as of the actual cause of Knox's death. Concerned that the complexity of the facts might give rise to an ambiguous guilty verdict, the trial court recommended that a special verdict form be given to the jury so that the "Court of Appeals would know whether or not the jury felt [Mitchell] did one or both of the acts that caused the death, to wit, shooting from the balcony, and/or driving the vehicle and running him over."[2] Both the District Attorney and Mitchell's counsel agreed to the court's suggestion that the jury be asked to render special findings.

At the conclusion of the case, the jury deliberated for four days. On the fourth day of deliberations, the jury requested further instruction from the court on the law of aiding and abetting.[3] Seventy-five minutes after receiving

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[1] RT 609:1-4.

[2] RT 461:10-15.

[3] The jury's note to the court read:

> We, the jury in the above entitled action, request the following:
> Further instruction on the meaning of "to aid and abet." Specifically, is the defendant aiding and abetting in the commission of a crime (murder) or the natural consequences (murder) if he allows or, facilitates or promotes the introduction of deadly firearms into his home.

Court's Exhibit B.

an additional instruction, the jury returned a verdict of guilty on the charge of second degree murder. However, in its special findings, the jury found that Mitchell had not used a firearm and that Mitchell had not driven the car that ran over Knox.[4] Accordingly, the jury found that Mitchell did not commit either of the acts that caused Knox's death.

After unsuccessfully pursuing state court remedies, Mitchell filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254. Mitchell claimed that there was insufficient evidence to sustain his murder conviction insofar as the jury found not true the facts giving rise to direct perpetrator liability. In light of the jury's special findings rejecting the direct perpetrator theory advanced by the State at trial, on habeas review the State defended the jury's verdict by explaining that the jury must have found that Mitchell aided and abetted Knox's murder by allowing Mitchell's balcony to be used by the person or persons who shot Knox. The district court, adopting the findings, conclusions and recommendations of a magistrate judge, denied Mitchell's habeas corpus petition.

Mitchell appealed the denial of his habeas petition to the Ninth Circuit Court of Appeals. Once again, the State attempted to defend the jury's verdict on an aider and abettor theory. The Ninth Circuit, in a published decision authored by Judge Kozinski, rejected the State's argument and reversed the district court's denial of the petition, holding that the prosecution had failed to present sufficient evidence to support Mitchell's conviction. The

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[4] CT 207, 210; RT 637:10-24.

Ninth Circuit reasoned that because the jury found that Mitchell neither fired any of the bullets that struck Knox nor drove the vehicle that hit Knox, Mitchell could be guilty of Knox's murder, if at all, only as an aider and abettor.[5] The only evidence in the record even related to this one remaining theory of liability was Mitchell's relationship with gang members and his presence near the scene of the crime. Holding that evidence of gang affiliation and mere presence at the scene of the crime, without more, is insufficient to support a conviction for aiding and abetting a murder, the Ninth Circuit overturned Mitchell's conviction.

In a petition for rehearing, the State attempted for the first time to justify the jury verdict on a direct perpetrator theory of liability. This theory of liability was novel to the habeas corpus proceedings to that point; it had not been raised before the magistrate judge, the district court, or the Ninth Circuit in the first instance. In its petition for rehearing, the State raised for the first time the two arguments that it now raises in its Petition before this Court. First, the State argued that despite the jury's special findings to the contrary, the jury could have found Mitchell liable as a direct perpetrator. In an attempt to support this argument, the State cited to cases dealing not with special jury findings, but with inconsistent general

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[5] *Mitchell v. Prunty*, 107 F.3d 1337, 1340 (9th Cir. 1997), *amended, reh'g en banc denied*, No. 94-5590, 1997 U.S. App. LEXIS (9th Cir. Apr. 10, 1997), *petition for cert. filed*, No. 97-77 (July 8, 1997) (hereinafter *Mitchell*). The Ninth Circuit's opinion in *Mitchell* is attached as Appendix A to the State's Petition.

verdicts. Second, the State argued that in conducting the sufficiency-of-the-evidence review, the Ninth Circuit should have considered evidence directly contrary to the jury's special findings. Once again, the State cited cases for this proposition wrested out of the context of general jury verdicts.

The Ninth Circuit did not require Mitchell to respond to the State's arguments raised for the first time in its petition for rehearing. Rather, the Ninth Circuit denied the petition for rehearing and amended its opinion by summarily dismissing in a footnote the State's unsupported argument:

> In its petition for rehearing, the state for the first time urges us to ignore [the jury's] findings in determining whether the evidence presented at trial was sufficient to convict. It states: "[I]t is ... possible the jury was convinced of petitioner's guilt as a direct perpetrator ... even though they did not find petitioner personally used a firearm, and found he was not the driver of the car." Petition for Rehearing at 7. After all, the government explains, "seemingly inconsistent verdicts do not indicate the prosecutor failed to prove all the essential elements of the offense." *Id.*
>
> In support of its argument, the state points to *United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L.Ed.2d 461 (1984); *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996), *cert. denied*, --- U.S. ---, 117 S. Ct. 961, 136 L.Ed.2d 847 (1997); and *United States v. McKinney*, 88 F.3d 551 (8th Cir. 1996). But these cases stand

> for an altogether different proposition: that in reviewing the sufficiency of the evidence on one count, acquittals on other, related counts, are not conclusive. *See Powell*, 469 U.S. at 67, 105 S. Ct. at 478 ("Sufficiency-of-the-evidence review ... should be independent of the jury's determination that evidence on another count was insufficient."); *Shenberg*, 89 F.3d at 1470 ("[N]either the acquittal of appellants nor their codefendants on other counts alleging similar or related conduct is relevant to the issue of whether sufficient evidence supports appellants' RICO conspiracy convictions."); *McKinney*, 88 F.3d at 555 ("Appellate review of a conviction on one count ... takes place independent of the jury's determination that evidence on another count was insufficient." (internal quotation omitted)). This is true as a simple logical matter; an acquittal is not proof of *any* predicate fact.
>
> Special findings, by contrast, are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights.[6]

In so rejecting the State's novel argument, the Ninth Circuit drew the logical and legally sound distinction between general jury verdicts and special findings. All of the cases cited by the State -- both in its petition for

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[6] *Mitchell*, 107 F.3d at 1339 n.2.

rehearing before the Ninth Circuit and in its Petition before this Court -- are drawn from the context of general jury verdicts. The State's cases stand for the unremarkable -- and in this case, irrelevant -- proposition that general verdicts of acquittal are not findings of fact, and that consequently an acquittal on one count has no effect on a conviction on another count. As the Ninth Circuit recognized, however, and as all relevant federal precedent dictates, special jury findings are fundamentally different from general verdicts. The Ninth Circuit did nothing more than give effect to those special findings. The Ninth Circuit's procedure in no way conflicts with the precedent of this Court or the law of other circuits.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S TREATMENT OF THE JURY'S SPECIAL FINDINGS IS CONSISTENT WITH DECISIONS OF THIS COURT AND OF THE COURTS OF APPEALS.

In its review of the single count charged against Mitchell, the Ninth Circuit held that the jury's special findings that Mitchell had not used a firearm and had not driven the car that ran over the victim were "dispositive of the questions put to the jury."[7] Because these special findings precluded a conviction based on a theory of direct perpetrator liability, the Ninth Circuit examined whether there was sufficient evidence for a rational jury to convict on the only remaining theory of liability -- aiding and abetting. The Ninth Circuit then analyzed

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[7] *Mitchell*, 107 F.3d at 1139 n.2.

whether the evidence not rejected by the jury in its special findings was sufficient to support the conviction. The relevant caselaw supports the procedure followed by the Ninth Circuit.

A. The Special Finding Is A Unique Procedural Mechanism Whereby A Jury Makes Findings Of Fact And Announces The Theory Of Liability On Which Its Conviction Is Based.

Special findings by juries are little known and infrequently used in federal courts because of concerns that a defendant's right to an unfettered jury trial might be compromised by allowing a judge to ask the jury questions directly related to the verdict.[8] However, in certain circumstances, special findings are used to allow juries to make ultimate determinations of fact and to choose among competing theories of liability. Such special findings are used to avoid the ambiguity that may result from the use of general verdicts alone.

For example, special findings have been implemented in conspiracy cases to allow the jury to definitely establish, as fact, whether a defendant had actually withdrawn from a conspiracy on a specified date.[9] Courts have also suggested that special findings be used to allow juries to

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[8] *See United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

[9] *See, e.g., United States v. Stassi*, 544 F.2d 579, 584 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976); *United States v. Ogull*, 149 F. Supp. 272 (S.D.N.Y. 1957).

make findings of fact regarding the object of a conspiracy, where the sentence to be imposed might differ according to that object.[10] In these situations, such special findings allow the jury to speak beyond their general verdict to prevent "ambiguous verdicts of guilty with two possible alternative interpretations."[11]

Similarly, many courts use special findings in complex RICO cases to clarify for appellate courts "the specific offenses the jury relied upon in reaching its verdict."[12] In these cases, special interrogatories are used "to indicate, for the purpose of a potential appeal, which predicate acts the jury had found to be proven so as to satisfy the RICO statute's pattern of racketeering requirement."[13]

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[10] *See, e.g.*, *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir. 1990); *Newman v. United States*, 817 F.2d 635, 637-38 (10th Cir. 1987); *United States v. Dennis*, 786 F.2d 1029, 1038 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *Brown v. United States*, 299 F.2d 438, 439-40 (D.C. Cir.), *cert. denied sub nom.*, *Thornton v. United States*, 370 U.S. 946 (1962).

[11] *Owens*, 904 F.2d at 415.

[12] *United States v. Bertoli*, 854 F. Supp. 975, 1069 (D.N.J. 1994); *see also United States v. Pungitore*, 910 F.2d 1084, 1136 n.74 (3d Cir. 1990), *cert. denied sub nom.*, *Scarfo v. United States*, 500 U.S. 915 (1991); *United States v. Palmieri*, 630 F.2d 192, 203 (3d Cir. 1980).

[13] *Bertoli*, 854 F. Supp. at 1069.

Special findings are often used to allow the jury to indicate the theory of liability upon which it relied in rendering its verdict. In *United States v. Melvin*,[14] the First Circuit authorized the use of special findings for a jury to identify the incriminating conduct in which it found the defendant to have engaged, where the statute at issue established varying penalties depending on the acts committed. Similarly, in *United States v. North*,[15] the D.C. Circuit upheld a guilty verdict and special findings that specified the theory of liability that the jury relied on in convicting the defendant of falsifying and destroying documents.

Finally, in *United States v. Miller*,[16] the Tenth Circuit held that special findings could and should be used to allow the jury to announce the theory of liability upon which it relies. In *Miller*, the defendant was convicted under a statute that allowed for two potential theories of liability. After the conviction and prior to the review, one of those theories had been invalidated by this Court.[17] In determining whether the conviction was supported by sufficient evidence, the *Miller* court, unlike the Ninth

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[14] 27 F.3d 710, 716 (1st Cir. 1994).

[15] 910 F.2d 843, 911 (D.C. Cir. 1990).

[16] 84 F.3d 1244 (10th Cir.), *cert. denied sub nom.*, *Hicks v. United States*, 117 S. Ct. 443 (1996), *and overruled in irrelevant part by United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997), *petition for cert. filed*, No. 97-5648 (Aug. 18, 1997).

[17] *Miller*, 84 F.3d at 1257 (noting that this Court in *Bailey v. United States*, 116 S. Ct. 501 (1995), had rejected one of two possible statutory theories of liability).

Circuit in *Mitchell*, did not have special findings that shed light on the jury's thought process. The *Miller* court, overturning the conviction for insufficiency of the evidence because it could not determine whether the jury relied on the invalid theory of liability, noted that a jury's "special verdict indicating it rejected the legally erroneous ground" would have allowed the court to be "absolutely certain that the jury did not make such an unwitting error."[18]

As the foregoing cases indicate, the courts in almost every circuit allow use of special jury findings to reduce the ambiguity of a general verdict. Through its special findings, the jury makes findings of fact and speaks beyond its general verdict to specify the theory of liability on which its verdict is based.

B. The Ninth Circuit In *Mitchell* Gave The Proper Effect To The Jury's Special Findings.

As the trial court found in this case, Mitchell's trial was a factually complicated one that presented an unusual question of causation. For the expressed purpose of eliminating any "ambiguity in the verdict," the trial court submitted special interrogatories to the jury so that, if convicted, the "Court of Appeals would know whether or not the jury felt he did one or both of the acts that caused the death."[19] Mitchell's jury specifically found that he did not do either.

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[18] *Miller*, 84 F.3d at 1257.

[19] RT 461:10-15.

Unlike the case in *Miller*, the jury in Mitchell's trial provided the Ninth Circuit with findings that would allow it to be "absolutely certain" which theory of liability the jury relied on in returning a guilty verdict. The Ninth Circuit, in accordance with the procedure utilized in other circuits as discussed above, merely gave effect to those special findings. The Ninth Circuit was not errant in holding that those special findings "were dispositive of the questions put to the jury"[20] and in subsequently analyzing whether the evidence that did not conflict with the jury's special factual findings was sufficient to support the only remaining theory of liability.

II. THE CASES CITED BY THE STATE ARE INAPPLICABLE BECAUSE THEY DEAL WITH GENERAL VERDICTS RATHER THAN SPECIAL FINDINGS.

A. Special Findings Are Fundamentally Different From General Verdicts.

In its attempt to create a conflict worthy of certiorari review, the State asks this Court to ignore the directly relevant caselaw, and instead, to impose rules applicable to an entirely different area of law. The State claims that the Ninth Circuit's reliance upon special findings in its sufficiency of the evidence review is "*the equivalent* of a refusal to consider the facts underlying counts in which a defendant has been acquitted in determining whether

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[20] *Mitchell*, 107 F.3d at 1339 n.2.

their [sic] was sufficient evidence to support guilty findings on other counts."[21]

The State's entire "equivalence" argument is fundamentally flawed. It hinges on the false assumption that a special finding by a jury is the same as a general acquittal. The State fails to offer this Court any relevant authority to support such an assumption. In fact, in its entire Petition, the State does not cite to a single federal case in which a special finding is discussed.[22]

Contrary to the State's unfounded claim that a special finding is "the equivalent" of a general acquittal, the very nature of special findings dictates that they are fundamentally different from general acquittals. While a general

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[21] Petition at 10 (emphasis added).

[22] In arguing that the Ninth Circuit is in conflict with this Court and other *federal* courts, the State throws one California case into the mix. *People v. Santamaria*, 8 Cal. 4th 903, 884 P.2d 81, 35 Cal. Rptr. 2d 624 (1994), is the only case cited in the State's entire petition that addresses the issue of special jury findings. Even this case, however, is not relevant to the issue decided by the Ninth Circuit because it dealt with the collateral estoppel effect of a sentence enhancement allegation.

Moreover, any conflict between *Mitchell* and *Santamaria* would not warrant certiorari review. Except in the most extreme circumstances, this Court has generally deferred to the judgment of the circuits in cases of conflicting views between a state court and a circuit court. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

acquittal "is not a finding of any fact,"[23] a special finding is precisely that. As noted above, special findings are used in rare circumstances where actual findings of fact or a clear indication of the theory of liability relied on are desired. Courts therefore consistently draw a distinction between general verdicts and special findings.[24]

B. Cases Dealing With General Verdicts Are Irrelevant To The Issues Decided By The Ninth Circuit, And Therefore *Mitchell* Is Not In Conflict With The Precedent Of This Court Or Of the Courts Of Appeals.

The cases cited by the State in its Petition are not relevant to any of the issues decided by the Ninth Circuit. They stand for two general principles, neither of which is called into question by the Ninth Circuit's opinion in *Mitchell*: first, that inconsistent *general verdicts* on *separate counts* do not require reversal; and second, that a *general verdict of acquittal* is not a finding that the defendant did not do the acts charged, and therefore does not affect the sufficiency-of-the-evidence review on a *separate charge*. The cases standing for these propositions do not demon-

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[23] Petition at 7 (summarizing the holding in *United States v. Watts*, 117 S. Ct. 633 (1997)).

[24] *See, e.g.*, *Miller*, 84 F.3d at 1257 (drawing distinction between general verdict and special finding); *Owens*, 904 F.2d at 414-15 (suggesting use of special finding as opposed to general verdict); *Orozco-Prada*, 732 F.2d at 1076 (same); *Newman*, 817 F.2d at 637-38 (10th Cir. 1987) (same); *Dennis*, 786 F.2d at 1038 (same); *Quicksey*, 525 F.2d at 341 (same); *Brown*, 299 F.2d at 439-40 (same).

strate that the Ninth Circuit erred or created a conflict among the circuits, because this case, unlike those cited by the State, involves *special findings* by a jury with respect to a *single count*.

In *United States v. Powell*,[25] on which the State principally relies, the jury convicted the defendant of a compound crime, but acquitted the defendant on counts charging the predicate acts. Prior to *Powell*, this Court had held in *Dunn v. United States*[26] that consistency among verdicts on separate counts is not necessary, because res judicata would not bar inconsistent verdicts between separate indictments. The *Powell* Court, drawing on *Dunn*'s rationale, reasoned that courts cannot be called upon to determine which of two inconsistent general verdicts the jury "really meant," because "such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the deliberations that courts generally will not undertake."[27]

The Ninth Circuit in *Mitchell* did not undertake such a speculative inquiry, because it did not have to. The jury, through its *special findings*, clearly and explicitly told the court and the parties, who stipulated to the use of the special findings, the theory of liability on which it relied in determining Mitchell's guilt on the single count being tried. As discussed above, special findings are used for precisely this purpose; they allow courts to determine the

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[25] 469 U.S. 57 (1984).
[26] 284 U.S. 390 (1932).
[27] *Powell*, 469 U.S. at 66.

theory on which a conviction is based *without* having to speculate as to the meaning of a general verdict. Given the jury's special findings, the Ninth Circuit properly concluded that the jury's conviction was based on an aider and abettor theory of liability.

Powell and *United States v. Watts*[28] likewise do not conflict with the Ninth Circuit's sufficiency-of-the-evidence review. The well-settled principle that a general verdict is not a finding of any fact, and that consequently an acquittal on one count does not affect the sufficiency-of-the-evidence review on a separate count, has no application here. While general verdicts are not findings of fact, special findings are precisely that. Indeed, *Watts*, one of the cases principally relied upon by the State, makes this clear:

> "An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. *Without specific jury findings, no one can logically or realistically draw any factual finding inferences* . . . ."[29]

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[28] 117 S. Ct. 633 (1997).

[29] 117 S. Ct. at 637 (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, C.J., dissenting)) (emphasis added).

In contrast, in this case, where there *were* specific jury findings, factual finding inferences can and must be made, otherwise the special findings have no effect.[30]

As discussed above, courts routinely utilize special findings to resolve issues of fact. If, as the State suggests in its Petition, rules related to general verdicts on separate counts were lifted out of the context in which they were developed and applied to special findings, the special finding device would be effectively eradicated. No longer would courts be able to avoid ambiguous jury verdicts by asking the jury to make specific findings of fact or to announce the theory of liability on which it relied. Countless verdicts would need to be struck down and sentences vacated because courts would be stripped of their ability to elicit less ambiguous verdicts from juries.

In sum, the State asks much of this Court. The State suggests that this Court should ignore relevant caselaw, and instead, impose on special findings rules fashioned for the general verdict -- a fundamentally different device. The State also asks that this Court overlook the nullifying effect that imposing this rule would have on special

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[30] All of the cases cited by the State are also distinguishable because in every one of those cases, the courts considered the effect of general verdicts on *multiple counts*. In contrast, Mitchell was charged with a *single count*, and the special findings at issue went *directly* to that single count. It would be illogical to preclude consideration of factual findings related to a single count in an analysis of the sufficiency of the evidence supporting that count.

findings. In support of its argument, the State cites to no relevant cases.

II. *TEAGUE V. LANE* IS INAPPLICABLE BECAUSE THE NINTH CIRCUIT DID NOT ANNOUNCE A NEW RULE OF LAW IN *MITCHELL*.

The State argues that the Ninth Circuit created a "new rule" in *Mitchell* that should not be applied retroactively to Mitchell under *Teague v. Lane*.[31] This argument is without merit for two reasons. First, the Ninth Circuit did not create a "new rule" as defined in *Teague*, and therefore the non-retroactivity rule established in *Teague* is not applicable. Second, even if the Ninth Circuit had announced a new rule in *Mitchell*, this case would fall squarely within the "fundamental fairness" exception established in *Teague*.

As discussed above, the Ninth Circuit was in line with other federal courts in its treatment of the special findings made by the jury. Thus, the Ninth Circuit neither broke new ground nor imposed any new obligations by treating special findings in the same manner that other federal courts have done. The Ninth Circuit's ruling was "dictated by precedent existing at the time [Mitchell's] conviction became final,"[32] and *Teague* is therefore not applicable.

Teague would not apply in any event because the Ninth Circuit's holding falls within the "fundamental fairness" exception set forth in *Teague*. Giving legal effect to the jury's special findings is clearly a "bedrock proce-

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31 489 U.S. 288 (1989).

32 *Teague*, 489 U.S. at 301.

dural element" that is "central to an accurate determination of innocence or guilt."[33] The jury in this case made findings of fact that clearly established the theory of liability on which its verdict was based; to disregard those findings now would deprive Mitchell of his fundamental right to a jury trial. As the Ninth Circuit noted in summarily dismissing the State's arguments, "Having agreed to the [special verdicts], the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights."[34]

As such, *Teague* is not applicable here and this Court should not undertake certiorari review of the Ninth Circuit's decision in *Mitchell*.

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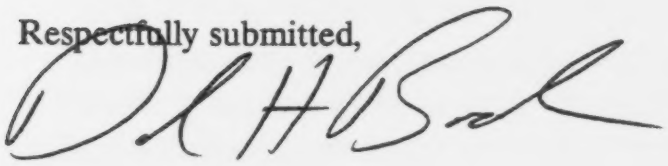
[33] *Teague*, 489 U.S. at 311, 313.

[34] *Mitchell*, 107 F.3d at 1339 n.2.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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